No. 75-386

Supreme Court, U. S.
FILED
NOV 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL L. ROCKWELL, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In this income tax case, both courts below upheld the Commissioner's contention that petitioner[1] was a dealer in real estate so that his gain from the sale of several properties was taxable as ordinary income and not as long-term capital gain (Pet. App. C A10-A52; Pet. App. B A2-A10).

Although petitioner does not challenge the substantive correctness of the factual question resolved against him, he claims (Pet. 6-12) that the Tax Court erred in imposing the burden of proof upon him. However, in *Helvering* v. *Taylor,* 293 U.S. 507, 515, this Court long ago settled that the burden of proof is on the taxpayer in a

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[1]"Petitioner" refers to Michael L. Rockwell. Regina Rockwell is a party to these proceedings only because joint income tax returns were filed for the years in question.

Tax Court proceeding to review the Commissioner's determination of a deficiency. See also *Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Welch* v. *Helvering*, 290 U.S. 111, 115. Accord: *United Aniline Co.* v. *Commissioner*, 316 F.2d 701, 704 (C.A. 1); *Ullman* v. *Commissioner*, 264 F.2d 305, 308 (C.A. 2); *Geiger* v. *Commissioner*, 440 F.2d 688 (C.A. 9); *MacGuire* v. *Commissioner*, 450 F.2d 1239, 1243 (C.A. 5); *Brumley-Donaldson Co.* v. *Commissioner*, 443 F.2d 501, 504 (C.A. 9). 9 Mertens, *Law of Federal Income Taxation* (Rev.), § 50.61; Rule 142(a), Rules of Practice and Procedure of the United States Tax Court (effective January 1, 1974).

The only exception to this rule is where the Commissioner raises new matters in his answer (Rule 142(a), Rules of Practice and Procedure, United States Tax Court), determines fraud (Section 7454(a) of the Internal Revenue Code of 1954, 26 U.S.C.), or where specific statutes provide for a shifting of the traditional burden of proof (see, *e.g.*, Sections 534(a), 6902(a)). Thus, in the context of this case, the burden of proof imposed on petitioner was to show that the Commissioner's determination was wrong as to each separate piece of property which the Commissioner had claimed was held by the taxpayer for sale to customers in the ordinary course of business. *Foster* v. *Commissioner*, 391 F.2d 727, 735 (C.A. 4); *Hoffman* v. *Commissioner*, 298 F.2d 784, 788 (C.A. 3); *Anderson* v. *Commissioner*, 250 F.2d 242, 246 (C.A. 5), certiorari denied, 356 U.S. 950. Indeed, petitioner was able to sustain his burden of proof with respect to some of the properties in question (see Pet. App. C A40, A44-A45).

Contrary to petitioner's contention (Pet. 8, 9), the decision below does not conflict with *Barnes* v. *Commissioner*, 408 F.2d 65 (C.A. 7), certiorari denied, 396

U.S. 836. Although that decision referred to the presumption of correctness which attaches to the Commissioner's determinations as "procedural" (408 F.2d at 68), the court there imposed the burden of persuasion as to the merits of the case on the taxpayer. Similarly, in *Foster* v. *Commissioner*, *supra*, 391 F.2d at 735-736, and *Biggs* v. *Commissioner*, 440 F.2d 1, 4-5 (C.A. 6), relied upon by petitioner (Pet. 7-8, 9, 10), the courts sustained decisions of the Tax Court adverse to the taxpayers because they failed to bear their burden of showing that the Commissioner's determinations were erroneous.[2]

Finally, petitioner contends (Pet. 12) that placing the burden of persuasion on him as the Tax Court Rules of Practice and Procedure provide denied him due process and the equal protection of the laws. But apart from the long-standing approval of the rule by this Court, the court of appeals correctly observed (Pet. App. B A9-A10) that placing the burden of proof on the taxpayer is eminently fair, as a matter of common sense, because the taxpayer knows the facts of his transactions and can testify concerning them, while the Commissioner must normally rely on documentary evidence.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[2] *Weir* v. *Commissioner*, 283 F.2d 675 (C.A. 6), and *Herbert* v. *Commissioner*, 377 F.2d 65 (C.A. 9), cited by petitioner (Pet. 9, 11), are not to the contrary. In those cases, the court held that the taxpayer satisfied his burden of proof by introducing competent and sufficient evidence to convince the Tax Court that the Commissioner's determination was wrong. In the absence of any countervailing evidence to show that there was some deficiency, the taxpayer was entitled to prevail. See *Foster* v. *Commissioner*, *supra*, 391 F.2d at 735-736.

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